APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN MARDULA,	CASE NO. BC104006
Plaintiff,	DEMURRERS BY DEFENDANTS
VS.	RANCHO DOMINGUEZ BANK AND DANIEL ROBERTS
RANCHO DOMINGUEZ BANK, DANIEL ROBERTS, and DOES 1-25, Inclusive,	DATE: July 7, 1994
	TIME: 8:30 A.M.
	PLACE: DEPT. 40
Defendants.	TRIAL DATE: None
	DISC. C/O: None
	MOTION C/O: None

TO: PLAINTIFF JOHN MARDULA AND TO HIS ATTORNEYS OF RECORD, REHWALD RAMESON LEWIS & GLASNER:

Defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS hereby demur to the Complaint of Plaintiff JOHN MARDULA, on each of the following grounds:

DEMURRERS TO THE FIRST CAUSE OF ACTION

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS because it is preempted by 12 U.S.C. § 24.

2. The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendant DANIEL K. ROBERTS because the written contract attached to the Complaint and incorporated by reference within it shows on its face that Defendant DANIEL ROBERTS is not a party to that contract.

DEMURRER TO THE SECOND CAUSE OF ACTION

3. The Second Cause of Action for bad faith denial of the existence of a contract fails to state facts sufficient to constitute a cause of action because there was, and is, no enforceable contract between Plaintiff and any of the defendants and, therefore, it was not bad faith to accurately deny that any alleged contract between the parties was unenforceable.

Dated: June 2, 1994.

ROBERTS AND ROBERTS

BY: THEODORE K. ROBERTS
Theodore K. Roberts
Attorneys for Defendants
RANCHO DOMINGUEZ
BANK AND
DANIEL ROBERTS

MEMORANDUM OF POINTS AND AUTHORITIES
STATEMENT OF FACTS

Many of the facts may be taken from the Complaint in this action. Paragraph 2 states: "At all times herein mentioned, Defendant RANCHO DOMINGUEZ BANK was a national bank authorized and existing under the Laws of the State of California and the Federal Government."

Paragraph 7 states: "On September 9, 1992, Plaintiff and Defendant entered into a written employment agreement wherein Plaintiff MARDULA was employed for the position of President/Chief Executive Officer of the RANCHO DOMINGUEZ BANK . . . ." Paragraph 7 incorporated by reference the written employment contract between RANCHO DOMINGUEZ BANK and JOHN J. MARDULA. It is dated September 9, 1992 and does not refer in any way to, and is not signed by, Defendant DANIEL K. ROBERTS.

Paragraph 10 admits: "On April 15, 1994, the Board of Directors passed the following resolution: ' . . . the Board of Directors approved that a request be made to John J. Mardula to resign as President and CEO of RANCHO DOMINGUEZ BANK effective 4/5/94 with one month severance pay upon execution of a release of his employment contract/or terminate Mr. John J. Mardula effective immediately if no resignation is forthcoming."

While the Complaint is actually silent on the main point, MARDULA did not resign and was terminated for cause immediately by said resolution of the Board of Directors of RANCHO DOMINGUEZ BANK.

Paragraph 11 states: "The Defendants, and each of them, have breached the employment contract in that the employment contract calls for a six month severance package."

Paragraph 14 of the Second Cause of Action for "Bad Faith Denial of the Existence of a Contract" alleges: "On or

about April 5, 1994, Defendants, and each of them, breached in bad faith and denied the existence of a lawful contract entered into by and between Plaintiff and the Defendant BANK."

THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT IS PREEMPTED BY 12 U.S.C § 24

The key case on the preemption of employment contracts between Bank officers and national banks is *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49 (1990). An extended quotation from this case shows its application to the facts at hand. In *Wells Fargo*, bank employees had contracts which provided for severance pay but were terminated without cause or severance.

"If, however, these plaintiffs are classified as 'officers' under Paragraph Fifth and thus 'at will' employees, state law is preempted by federal law despite any contrary understanding between employer and employee. (See *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593,596-597, 86 Cal.Rptr. 52.) Thus, the key question is whether federal law dictates 'at will' employment status for these plaintiffs.

"Paragraph Fifth, adopted in 1864 (Act of June 3, 1864 ch.106 § 8, 13 Stat. 99,101), is part of the National Bank Act (12 U.S.C. § 24). It defines the corporate powers of national banking associations, including the power to make contracts, sue and be sued, prescribe bylaws and exercise all incidental powers necessary to carry on the business of banking. Two of its ten 'paragraphs' are pertinent here: 'a national banking association . . . shall have power - . . . [¶] Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them

at pleasure, and appoint others to fill their places. [¶] Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privilegs granted to it by law exercised and enjoyed.'

"Wells Fargo contends that plaintiffs are 'officers' of the bank and are therefore subject to removal without cause." *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49,51 (1990).

"To determine the scope of 'at will' employment by national banks, we must consider the purpose and function of Paragraph Fifth. The stage for interpreting the 'at will' provision was set in *Westervelt v. Mokrenstecher* (8th Cir.1896) 76 Fed 118. There, persons who had posted a bond to secure the performance of the bank's cashier refused to pay the bank's receiver on the ground that the bond expired when the prior cashier's one-year term ended. In spite of bylaws that set a one-year term, the court rejected the contention that the cashier's office had a one-year term. The Court explained: 'The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers "or any of them at pleasure and appoint others to fill their places." It provided that this cashier should always hold his (or her) office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal when-

ever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys . . . . It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he (or she) lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success — to the very existence — of a banking institution that the board of directors should have the power to remove such an officer, and to put in his (or her) place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, ex industria, to provide for this very contingency." (*Id.* at p 122.)

"Later decisions have used the 'at pleasure' provision of Paragraph Fifth to protect national banks and their customers from unwise employment agreements that would have provided security for key bank personnel. For example, in *Copeland v. Melrose Nat. Bank* (1930) 229 A.D. 311, 241 N.Y.S. 429, the bank agreed to employ its vice president for three years at a salary of $8,000 per year and to pay the rest of his salary as liquidated damages if it terminated him early. The *Copeland* court held that the bank had no authority to enter such an agreement, which conflicted with the employee's 'at will' status: 'In *Rankin v. Tygard*, [8th Cir.1912] 119 C.C.A 591, 198 F. 795, the statute was under consideration, and it was held that no term of office could be fixed which would prevent the bank from exercising its unrestricted power to remove an officer at pleasure during the term. [¶] Plaintiff's engagement was merely a hiring, terminable at the will of the directors. The intent of the statute was to place the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure. A contract for a definite term which forbids

such discharge except under the penalty of paying compensation for the full term violates the statute, and is unenforceable. To uphold the liquidated damages provision of the contract would be to contenance a patent subtrefuge designed to circumvent the law. It is idle to say that the statute merely gives the power to discharge the official, without the right to do so. The grant of the power carries with it the untrammeled right to its exercise, free from penalty.' (*Copeland, supra*, 241 N.Y.S. at p 430.)

"More recently, one court has observed: 'The case law uniformly interprets [Paragraph Fifth] and substantially similar provisions as rendering unenforceable, is against public policy, all contractual provisions which do not allow a national banking institution to discharge its officers at will without incurring liability for breach of contract. [Citations]' (*McGeehan v. Bank of New Hampshire, Nat. Ass'n* (1963) 123 N.H. 83, 455 A.2d 1054,1055)." *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49,52-3 (1990).

"The consequence of finding an employee covered by this section are significant: not only does the employee serve at the pleasure of the appointing officer, but any employment agreement which states otherwise is void as against public policy." *Wells Fargo Bank v. Superior Court*, 228 Cal.App. 3d 288, 267 Cal.Rptr. 49,55 (1990).

THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT IS NOT PROPERLY STATED AGAINST DANIEL ROBERTS BECAUSE HE WAS NOT A PARTY TO IT

As previously indicated, Paragraph 7 of the Complaint incorporated by reference the written employment contract between RANCHO DOMINGUEZ BANK and JOHN J. MARDULA. It is dated September 9, 1992 and does not

refer in any way to, and is not signed by, Defendant DANIEL K. ROBERTS.

"Incorporating an exhibit by proper reference thereto in the pleading gives the pleader a convenient means of alleging the facts concerning the terms and effect of a document . . . ." 4 Witkin, *California Procedure*, Pleading § 381, p.431 (1985). However, the allegations of the contract attached to, and incorporated in the complaint take precedence over any inconsistent allegations in the complaint itself. See cases collected in 4 Witkin, *California Procedure*, Pleading § 385, p.433 (3rd Ed.1985).

Here the First cause of Action for breach of a written contract is stated against all defendants, including DANIEL ROBERTS, although he is not a party to the written contract, as its precise terms establish. Therefore, since Defendant DANIEL ROBERTS is not a party to the employment contract, it is improper to sue him for its breach.

THE SECOND CAUSE OF ACTION FOR BAD FAITH DENIAL OF THE EXISTENCE OF A CONTRACT MUST FAIL BECAUSE THERE WAS NO ENFORCEABLE CONTRACT

The elements of a cause of action for bad faith denial of a contract were first enunciated in *Seaman's Direct Buying Service v. Standard Oil Co.*, 36 Cal.3d 752,766, 206 Cal.Rptr. 354 (1984). In 5 Witkin, *California Procedure*, Pleading §§ 720-l, pp.167-8 (3rd Ed.1985), the *Seaman's* case is cited and the elements of the tort are explained. However, "plaintiff must allege the existence of a valid contract . . . ." 5 Witkin, *California Procedure*, Pleading § 721, p.167 (3rd Ed.1985).

Here, plaintiff has no enforceable contract against either Defendant for the reasons stated at length above. A fortiori, defendants are not liable for truthfully denying that there was an enforceable contract between Plaintiff MARDULA and Defendant RANCHO DOMINGUEZ BANK.

THESE DEMURRERS SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND

The issues presented by this Demurrer are essentially ones of law. "A trial Court may properly sustain a Demurrer to a Complaint without leave to amend when the matter presented can be determined as a matter of law." *Seymour v. State*, 156 Cal.App.3d 300, 201 Cal.Rptr. 15,18 (1984). Furthermore, a "general demurrer may be sustained without leave to amend where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action." 5 Witkin, *California Procedure*, Pleading § 946, p.380 (3rd Ed. 1985).

SANCTIONS ARE APPROPRIATE

The cause of action for bad faith denial of the existence of a contract unwittingly establishes why sanctions should be imposed in this case. Plaintiff MARDULA knew that the change of ownership of the Bank was led by DANIEL ROBERTS, a licensed California attorney, and that ROBERTS told him that he had no enforceable contract with the Bank. Yet both Plaintiff and his Counsel made no effort to establish the applicable law and went forward with a Complaint which is in no way warranted under either California or federal law — after being told that federal law precluded Plaintiff from enforcing his contract.

Although Code of Civil Procedure § 128.5 refers to "frivolous actions or tactics" and does not specifically mention law suits, there is nothing in either the statutory language,

nor the decisions construing it, to suggest that "entire actions" are not covered. *Lesser v. Huntington Harbor Corp.*, 173 Cal.App.3d 922,928, 219 Cal.Rptr. 562 (1985). Sanctions may be awarded when some causes of action are frivolous even though others are not. *Bach v. McNelis*, 207 Cal.App.3d 852,875, 255 Cal.Rptr. 232 (1989).

The attached Declaration of Theodore K. Roberts establishes that Defendants have incurred $2,600.00 in attorney's fees in preparing this demurrer.

CONCLUSION

For the foregoing reasons, defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS respectfully request that their Demurrers to Plaintiff's Complaint be sustained, and that such Demurrers be sustained without leave to amend.

Dated: June 2, 1994

ROBERTS AND ROBERTS

By: /s/ THEODORE K. ROBERTS
Theodore K. Roberts
Attorneys for defendants
RANCHO DOMINGUEZ BANK
and DANIEL K. ROBERTS

DECLARATION OF THEODORE K. ROBERTS

I, Theodore K. Roberts, hereby declare and state:

(1) I am an attorney at law licensed to practice before all courts in the State of California and I am making this declaration in support of Defendant RANCHO DOMIN-

GUEZ BANK and DANIEL ROBERTS' demurrer to the Complaint in this action.

(2) The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

(3) Prior to Daniel Roberts purchase of the overwhelming number of shares in RANCHO DOMINGUEZ BANK, there was discussion of the retention of officers and the legal liability of the BANK if officers were terminated at the time that there was a transfer in control of the BANK by the office of the Controller of the Currency.

(4) At DANIEL ROBERTS request, who is my brother and law partner, I researched the question and found the case of *Wells Fargo v. Superior Court*, which established that liquidated damages provisions and severance packages in employment contracts of BANK employees who served at the pleasure of the Board of Directors of the BANK were unenforceable.

(5) On April 5, 1994, prior to the Board of Directors meeting, BANK President JOHN MARDULA was informed that his employment contract was unenforceable as is alleged in the second cause of action of the Complaint.

(6) Nevertheless, MARDULA and his attorneys have brought this action which is not warranted under the law or the facts.

(7) The legal research on these questions, the preparation of the demurrer, and attendance at the hearing will require a total of 13 hours of work at $200.00 per hour. The BANK will be billed this amount, which is requested as sanctions under Code of Civil Procedure § 128.5.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 2, 1994 at Los Angeles, California.

/s/ THEODORE K. ROBERTS

Theodore K. Roberts